STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MARCH 31, 2023

IN THE MATTER OF:
Appeal Board No. 627733

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed January 11, 2023 (), the Administrative Law Judge sustained the employer's objection and overruled the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked as a full-time residency coordinator in the ER's hospital for about 17 years until September 27, 2022. The employer's policy allows for seven unscheduled absences in a year; progressive discipline is issued for any unscheduled absence in excess of seven. Any time an employee is sick and calls out of work, it is considered an unscheduled absence. The employer's policy further provides that an unscheduled absence of at least one half of an employee's scheduled day is counted as one

unscheduled absence. The claimant was aware of the employer's attendance policy.

The claimant was issued corrective discipline beginning on March 23, 2022, for unscheduled absences in excess of seven. The claimant was diagnosed with migraines on or about April 12, 2022, which the physician considered a chronic and lifelong impairment. The claimant continued to incur unscheduled absences well over the number allowed as she applied for leave pursuant to the Family Medical Leave Act (FMLA) for her migraine condition. On May 19, 2022, the claimant's supervisor issued a final warning for excessive absences and advised the claimant that further unscheduled absences may result in corrective action up to and including termination.

The claimant applied for FMLA leave for her migraine condition. On the FMLA paperwork, the claimant's physician indicated that the claimant's periodic flares require time off. Based on the physician's estimation that the claimant would have 1-2 episodes per month requiring 24 hours of time off per episode, the employer granted the claimant four absences per month for her migraines. The claimant was granted intermittent FMLA leave at the end of July.

On August 26, the employer reviewed the claimant's timecards for July and August with the claimant since her leave was granted retroactively. At that time, the claimant's supervisor reminded her that one additional unscheduled absence may result in her termination. However, she did not discuss with the claimant the impact of her approved FMLA on the policy of unscheduled absences.

The claimant had already used FMLA leave in the month of September. According to the employer, the claimant had already used four days of FMLA leave by September 12. On September 27, the claimant was scheduled to work from 8 a.m. to 4:30 p.m. She awoke with a migraine and reached out to her supervisor at 5 a.m. She advised her supervisor of the migraine, that she had just taken her medication and that she needed time before she could drive and report to work. The supervisor responded that the claimant should let her know when she was at work. The supervisor did not tell the claimant at that time that if she did not arrive at work by noon she would be terminated.

The claimant was concerned about driving while on her migraine medication which had been newly prescribed because it slowed her reflexes. However, by noon, the claimant felt ready to leave for work; she intended to make up her

time at the end of her workday. As the claimant was getting ready to leave, her supervisor called to advise her that she had already used all her allowed FMLA leave and that her lateness would constitute an unscheduled absence resulting in termination. At 12:08 p.m., following this phone call, the supervisor sent the claimant an email indicating she was initiating the claimant's termination. Had the claimant known that she would be terminated for arriving late that day despite her FMLA leave, she would have taken a car service to work instead of waiting until she felt safe to drive. The claimant arrived at work at 12:30 p.m. and was terminated for excessive absences.

OPINION: The credible evidence establishes that the claimant was discharged on September 27, 2022 for excessive absences after warning. The claimant readily conceded that, on September 27, she was scheduled to work beginning at 8 a.m. yet arrived at 12:30 p.m. and further conceded that she had received progressive discipline including a final warning for excessive absences. We do not agree that this case turns on whether the claimant self-diagnosed herself as able to work and should, therefore, not have waited until she felt able to drive. Rather, we find that it turns on whether, despite being advised of the employer's general attendance policy, she knew that she would be terminated for her lateness on a day she had a migraine after she had been approved for intermittent FMLA leave for her chronic migraine condition.

The claimant credibly and consistently testified that had her supervisor clarified for her that morning that if she was not at work by noon she would be terminated, she would have taken a car service instead of waiting until she felt able to drive on her own. We find it significant that the claimant's physician indicated that the

claimant required time off for her flare ups, even recommending 24 hours of time per flare up. We accept the claimant's credible and uncontroverted testimony that she stayed in contact with her supervisor that morning regarding her migraine and that her supervisor only advised her to let her know when she arrived at work. While the claimant conceded that she was advised of the employer's unscheduled absence policy, we accept her credible and uncontroverted testimony which further establishes that she was not advised about how her approved FMLA intermittent leave impacted that policy.

The employer's human resources representative testified that the claimant's doctor had estimated 1-2 episodes per month and recommended 24 hours per episode but then indicated that this equaled four days of leave time. It is

unclear how the employer determined this recommendation would total four days of leave or whether anyone advised the claimant about how the employer would calculate her FMLA leave given the employer's policy of counting a half day absence as an entire day. The claimant's testimony as well as the email from her supervisor establish that the claimant was only so advised after she had already failed to report to work by noon. The human resources representative, the only witness produced by the employer, readily conceded that she did not know what the claimant's supervisor discussed with the claimant either at the time of the warnings or on the claimant's final day of work.

The employer's testimony establishes that even if the claimant had been too sick to report to work that day, she would have been discharged for excessive absences. Under these circumstances, we conclude that the claimant did not know that arriving at 12:30 p.m. rather than at noon would lead to her immediate termination. Accordingly, while it was certainly within the employer's prerogative to discharge the claimant for excessive absences, the claimant's final absence does not constitute misconduct for Unemployment Insurance purposes.

DECISION: The decision of the Administrative Law Judge is reversed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future, is overruled.

The initial determination, holding the claimant eligible to receive benefits, is sustained.

The claimant is allowed benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER